



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of



DECISION

MDV/165574

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The attached proposed decision of the hearing examiner dated July 21, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

**PRELIMINARY RECITALS**

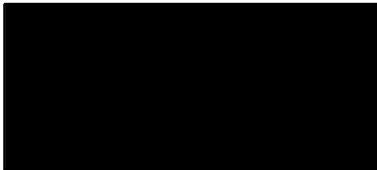
Pursuant to a petition filed April 22, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on May 28, 2015, at Waukesha, Wisconsin.

The issue for determination is whether \$192,309.12 which was placed in an irrevocable trust is a divestment when a promissory note was executed from the trust to the petitioner in the amount of \$192,309.12.

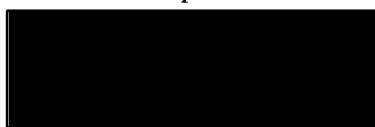
There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By:



Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On November 21, 2014 the petitioner submitted an application for Medicaid.
3. The agency processed that application, and requested additional verification. Between November 2014 and January 2015 the petitioner provided some, but not all of the verification requested. On January 5, 2015 the agency sent the petitioner a notice stating that her Medicaid application had been denied.
4. On January 30, 2015 the petitioner submitted another Medicaid application. The agency noted some discrepancies between the first and second applications. The agency requested additional verification.
5. On February 18, 2015 the petitioner provided [REDACTED] statements and a letter. The letter stated the following:

In response to your Notice of Proof, I have via separate fax submitted copies of account statements for all of [REDACTED] accounts from October 2013 moving forward. Please be advised that during this time frame [REDACTED] was liquidated. Also please note that on October 2, 2014, \$194,417.00 was loaned by [the petitioner] in exchange for a promissory note that is paying her \$7,500 per month until February 2017, a copy of which is also attached. Subsequently on November 7, 2014, a divestment of \$204,477.57 was made. Both of these withdrawals were made from [REDACTED]

6. The agency reviewed the promissory note. The promissory note was executed from the [REDACTED] Irrevocable Trust to the petitioner on October 3, 2014 in the amount of \$199,417.00. The promissory note had a 2.0% interest rate, and provided for payments back to the petitioner in the amount of \$7500 per month beginning on November 28, 2014 and ending on February 28, 2017.
7. Although the promissory note was for \$199,417.00, only \$192,309.12 was transferred from the petitioner's [REDACTED] Irrevocable Trust in October 2014.
8. The agency requested additional information regarding the irrevocable trust. On March 12, 2015 the petitioner's attorney faxed additional documents to the agency with a cover letter stating:

Attached please find a copy of the [REDACTED] Irrevocable Trust, created by [R.E.E.] as Grantor. This Trust was not reported as part of the original application process because it was not created or fund[ed] by [the petitioner]. She was not the Grantor of the Trust nor is she a beneficiary of the Trust. The Trust was created by [R.E.E.] and was funded by [R.E.E.] with a gift of assets she received from her mother.
9. In November 2014 the petitioner transferred \$204,477.57 from her [REDACTED] to the [REDACTED] Irrevocable Trust. The petitioner and the agency agree that this transfer is a divestment.
10. The agency determined that there was a total divestment of \$396,786.69 consisting of the October 2014 transfer in the amount of \$192,309.12 and the November 2014 transfer in the amount of \$204,477.57. On April 22, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

## DISCUSSION

When an individual, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(a)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. This transfer is defined as a divestment. *Id.* The divestment must occur during the five year look back period. Wis. Stat. § 49.453(1)(f)(2m). Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment. The divestment penalty period is

the determined by dividing the value of property divested by the average monthly cost of nursing facility services. Wis. Stat. § 49.453(3); *MA Handbook*, App. 17.5.

The petitioner made two money transfers from her [REDACTED] Irrevocable Trust. The petitioner admits that the November 2014 transfer in the amount of \$204,477.57 is a divestment. At issue is the October 2, 2014 transfer in the amount of \$192,309.12. On October 3, 2014 a promissory note was executed from the L. Irrevocable Trust to the petitioner in the amount of \$199,417.00. The promissory note had a 2.0% interest rate, and provided for payments back to the petitioner in the amount of \$7,500 per month beginning on November 28, 2014 and ending on February 28, 2017. The petitioner argues that the October 2014 transfer of \$192,309.12 is not a divestment because the promissory note allowed for that amount to be paid back to the petitioner.

When one considers this case and whether this is a transaction for less than fair market value, it is important to consider the divestment period on the admitted divestment of \$204,477.57. This divestment period very closely coincides with the length of payments on the promissory note. In other words the monthly payments from the promissory note plus any additional income cover the petitioner's nursing home care during the divestment period. At the end of this divestment period Medicaid coverage begins, and \$204,477.57 remains in the [REDACTED] Irrevocable trust. This is money that was originally transferred from the petitioner's bank account to the [REDACTED] Irrevocable trust, which will never have to be used to pay for the petitioner's care. The effect of the petitioner's actions is to shorten the divestment period while shielding a large portion of her assets.

It is clear that Petitioner hoped to take advantage of her creative Medicaid planning to become eligible for Medicaid despite her having ample resources that could have been used to pay for her institutional care. She attempts to defeat the Congressional purpose in addressing divestment in 1985. The House Committee on Energy and Commerce stated the following in its report:

The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

H.R. REP. No. 265, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt. 1, at 72 (1985)

Not only would her scheme have been unacceptable to that Committee it is unacceptable to the State of Wisconsin. Fortunately, it will not succeed.

Petitioner would have us believe that if her promissory note meets the requirements under § 49.453 specifically relating to promissory notes, that is the end of the story. I disagree. For two reasons I conclude that the policy and statute related to promissory notes do not control the outcome in this case because the money was transferred to an irrevocable trust.

First, *Buettner v. Wisconsin Department of Health and Family Services*, 264 Wis.2d 700 (Ct. App. 2003) directs that a transfer must be tested under general divestment provisions in addition to the requirements related to the specific form of the transfer. With regard to an annuity that met the value of the benefit test under § 49.453(4), the Court of Appeals noted:

As DHFS points out, subsec. (4) does not state that a transfer has been made for fair market value under subsec. (2)(a) so long as the asset transfer does not exceed the value of the benefit. Rather, it simply provides an additional requirement that is applicable only to irrevocable annuities.

\* \* \*

Thus, we construe § 49.453 to require irrevocable annuity transactions, made on or after an individual's look-back date, to satisfy both subsec. (2)(a) and (4) in order for the institutionalized person to secure or retain medical assistance eligibility.

Likewise, whether Petitioner's promissory note meets Wis. Stat. § 49.453(4c) is not determinative.

Further, the Court of Appeals in *Estate of Gerald Gonwa v. Wisconsin Department of Health and Family Services*, 265 Wis. 2d 913 (Ct. App. 2003) held that regardless of whether the asset held in an irrevocable trust is transferred as an annuity, it is nevertheless held in an irrevocable trust. Similarly, it does not matter if Petitioner's transfer to the trust was made through a promissory note because it was still held in a trust. I will also note that Petitioner transferred the assets to the trust on October 2 and the note was dated October 3.

I must now turn to whether the transfer to the L. Irrevocable Trust was a divestment. The general divestment provision at Wis. Stat. § 49.453(2)(a) incorporates the federal law at 42 USC 1396p(c)(2) which states that a transfer will not result in ineligibility if the assets transferred to a trust are transferred to a trust established either for the sole benefit of a child of Petitioner's who is blind or permanently and totally disabled or for the sole benefit of a disabled individual under the age of 65. Neither is true of the L. Irrevocable Trust. Moreover, she does not have a beneficial interest in the trust. By failing to fit into an exception, Petitioner's transfer to the trust is a divestment.

I find it interesting that the petitioner does not argue that the total amount of the promissory note is not a divestment. The only issue is the amount transferred in October 2014, which is approximately \$7,000 less than the value of the promissory note. If the promissory note were to control, then the value of the promissory note should be at issue instead of the transferred amount.

### **CONCLUSIONS OF LAW**

The agency properly determined that \$396,786.69 consisting of the October 2014 transfer in the amount of \$192,309.12 and the November 2014 transfer in the amount of \$204,477.57 from her Merrill Lynch account to an irrevocable trust was a divestment.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence **and explain** why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

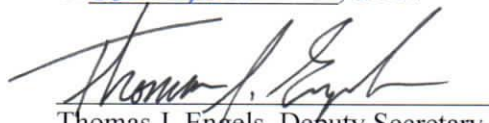
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of  
Madison, Wisconsin, this 23<sup>rd</sup> day  
of October, 2015.

  
Thomas J. Engels, Deputy Secretary  
Department of Health Services



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

PROPOSED DECISION

MDV/165574

**PRELIMINARY RECITALS**

Pursuant to a petition filed April 22, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on May 28, 2015, at Waukesha, Wisconsin.

The issue for determination is whether \$192,309.12 which was placed in an irrevocable trust is a divestment when a promissory note was executed from the trust to the petitioner in the amount of \$192,309.12.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Petitioner's Representative:

[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED]

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On November 21, 2014 the petitioner submitted an application for Medicaid.

3. The agency processed that application, and requested additional verification. Between November 2014 and January 2015 the petitioner provided some, but not all of the verification requested. On January 5, 2015 the agency sent the petitioner a notice stating that her Medicaid application had been denied.
4. On January 30, 2015 the petitioner submitted another Medicaid application. The agency noted some discrepancies between the first and second applications. The agency requested additional verification.
5. On February 18, 2015 the petitioner provided [REDACTED] statements and a letter. The letter stated the following:  

In response to your Notice of Proof, I have via separate fax submitted copies of account statements for all of [REDACTED] from October 2013 moving forward. Please be advised that during this time frame [REDACTED] was liquidated. Also please note that on October 2, 2014, \$194,417.00 was loaned by [the petitioner] in exchange for a promissory note that is paying her \$7,500 per month until February 2017, a copy of which is also attached. Subsequently on November 7, 2014, a divestment of \$204,477.57 was made. Both of these withdrawals were made from [REDACTED]
6. The agency reviewed the promissory note. The promissory note was executed from the [REDACTED] Irrevocable Trust to the petitioner on October 3, 2014 in the amount of \$199,417.00. The promissory note had a 2.0% interest rate, and provided for payments back to the petitioner in the amount of \$7500 per month beginning on November 28, 2014 and ending on February 28, 2017.
7. Although the promissory note was for \$199,417.00, only \$192,309.12 was transferred from the petitioner's [REDACTED] Irrevocable Trust in October 2014.
8. The agency requested additional information regarding the irrevocable trust. On March 12, 2015 the petitioner's attorney faxed additional documents to the agency with a cover letter stating:  

Attached please find a copy of the [REDACTED] Irrevocable Trust, created by [REDACTED]. This Trust was not reported as part of the original application process because it was not created or fund[ed] by [the petitioner]. She was not the Grantor of the Trust nor is she a beneficiary of the Trust. The Trust was created by [REDACTED] and was funded by [REDACTED] with a gift of assets she received from her mother.
9. In November 2014 the petitioner transferred \$204,477.57 from her [REDACTED] to the [REDACTED] Irrevocable Trust. The petitioner and the agency agree that this transfer is a divestment.
10. The agency determined that there was a total divestment of \$396,786.69 consisting of the October 2014 transfer in the amount of \$192,309.12 and the November 2014 transfer in the amount of \$204,477.57. On April 22, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

### DISCUSSION

When an individual, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(a)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. This transfer is defined as a divestment. *Id.* The divestment must occur during the five year look back period. Wis. Stat. § 49.453(1)(f)(2m). Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment. The divestment penalty period is the determined by dividing the value of property divested by the average monthly cost of nursing facility services. Wis. Stat. § 49.453(3); *MA Handbook*, App. 17.5.

The petitioner made two money transfers from her [REDACTED] Irrevocable Trust. The petitioner admits that the November 2014 transfer in the amount of \$204,477.57 is a divestment. At issue is the October 2014 transfer in the amount of \$192,309.12. On October 3, 2014 a promissory note was

executed from the [REDACTED] Irrevocable Trust to the petitioner in the amount of \$199,417.00. The promissory note had a 2.0% interest rate, and provided for payments back to the petitioner in the amount of \$7,500 per month beginning on November 28, 2014 and ending on February 28, 2017. The petitioner argues that the October 2014 transfer of \$192,309.12 is not a divestment because the promissory note allowed for that amount to be paid back to the petitioner.

When one considers this case and whether this is a transaction for less than fair market value, it is important to consider that the divestment period on the admitted divestment of \$204,477.57. This divestment period very closely coincides with the length of payments on the promissory note. In other words the monthly payments from the promissory note plus any additional income cover the petitioner's nursing home care during the divestment period. At the end of this divestment period Medicaid coverage begins, and \$204,477.57 remains in the [REDACTED] Irrevocable trust. This is money that was originally transferred from the petitioner's bank account to the [REDACTED] Irrevocable trust, which will never have to be used to pay for the petitioner's care. The effect of the petitioner's actions is to shorten the divestment period while shielding a large portion of her assets.

The Medicaid Handbook states that funds added to an irrevocable trust during the five year look back period are a divestment. *MA Handbook*, App. 17.13.3. By transferring assets from a bank account to a trust, the person is transferring assets at less than fair market value. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. § 49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. The petitioner argues this section does not apply in this case because the irrevocable trust was created by the children, and not the petitioner. This policy section does not require the petitioner to create the trust or that the trust be in the petitioner's name. I also note that the petitioner's attorney's fax from March 12, 2015 states that this trust was created with a gift assets from the petitioner. A gift of assets is also a divestment under the divestment rules. *MA Handbook*, App. 17.2.1.

In this case the petitioner also executed a promissory note from the irrevocable trust to the petitioner. The promissory note does not change the fact that money was transferred from a bank account to an irrevocable trust. The petitioner offers no legitimate reason for this transfer and promissory note.

I reviewed Wis. Stat. § 49.454(3)(b) and 42 U.S.C. 1396p(d)(3)(B)(ii) when deciding this case. Wis. Stat. § 49.454(3), which is nearly identical to the federal regulation provides:

TREATMENT OF IRREVOCABLE TRUST AMOUNTS. For the purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

- (a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:
  - 1. To or for the benefit of the individual, are considered income of the individual.
  - 2. For any other purpose, are considered transfers or assets by the individual subject to s. 49.453.
- (b) Any portion of an irrevocable trust from which, or any income on the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s. 49.453. The asset is considered to be transferred as of the date of the establishment of the trust, or if later, the date on which the payment to the individual was foreclosed. The value of the trust shall be determined for purposes of s. 49.453 by including the amount of any payments made from that portion of the trust after that date.



The transfer from the bank account to the irrevocable trust foreclosed the option of payment to the individual. The terms of the trust do not allow this trust to make payments to the individual. The date the money was transferred was October 2014. This statute specifically states, "the value of the trust shall be determined for the purposes of s. 49.453 [divestment statute] by including the amount of any payments made from that portion of the trust after that date. *Id.* The payments to the petitioner began in November 2014. This is after the October 2014 transfer, and thus under this statute are also considered a divestment.

The policy and statutes related to promissory notes do not apply to this case. The issue for this appeal is whether the portion of the transfer to the trust for which there is a promissory note is a divestment. I have found this is a divestment based upon the divestment rules for money transferred into an irrevocable trust. The divestment occurred when the money was transferred to the trust regardless of the promissory note.

The petitioner argues that the October 2014 transfer for which there is also a promissory note is not a divestment because the promissory note meets all of the criteria under Wis. Stat. § 49.453(4)(c). I agree with the petitioner that the promissory note meets the criteria under that statute. Had the petitioner executed the promissory note directly from the [REDACTED] to one of her children, rather than transferring the funds to an irrevocable trust, then there would not be a divestment. The issue arises because the petitioner transferred money into an irrevocable trust. At the hearing, the petitioner's attorney stated that the money was transferred to an irrevocable trust rather than one of the children because the children were also older, and there was a concern that a child could die. This highlights that this is not a fair market transaction.

If the laws and regulations related to promissory notes also apply when a person transfers money into an irrevocable trust, then those laws and regulations are in conflict with the policy sections related to the transfer of money to an irrevocable trust. The Medicaid Handbook states that funds added to an irrevocable trust during the five year look back period are a divestment. *MA Handbook*, App. 17.13.3. There is not a dispute that the petitioner transferred a total of \$396,786.69 consisting of the October 2014 transfer in the amount of \$192,309.12 and the November 2014 transfer in the amount of \$204,477.57 from her [REDACTED] to an irrevocable trust.

I find it interesting that the petitioner does not argue that the total amount of the promissory note is not a divestment. The only issue is the amount transferred in October 2014, which is approximately \$7,000 less than the value of the promissory note. If the promissory note were to control, then the value of the promissory note should be at issue instead of the transferred amount.

### **CONCLUSIONS OF LAW**

The agency properly determined that \$396,786.69 consisting of the October 2014 transfer in the amount of \$192,309.12 and the November 2014 transfer in the amount of \$204,477.57 from her [REDACTED] account to an irrevocable trust was a divestment.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

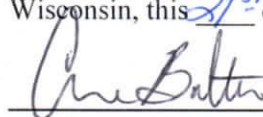
If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like

to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,  
Wisconsin, this 21<sup>st</sup> day of July, 2015

A handwritten signature in blue ink, appearing to read "Corinne Balter", is written over a horizontal line.

Corinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals